United States Court of Appeals

for the Second Circuit

SUPPLEMENTAL BRIEF

NO. 76-4085

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

STATE OF NEW YORK, *Petitioner,*
and
S & E SHIPPING CORPORATION, *Intervenor,*
vs.
UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION, *Respondents,*
and
COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA PUBLIC UTILITIES COMMISSION, SOO LINE RAILROAD COMPANY AND CONAGRA, INCORPORATED, *Intervenors.*

B

P/S

PETITION FOR REVIEW OF AN ORDER OF THE INTERSTATE COMMERCE COMMISSION

MOTION TO PARTIALLY DISMISS REVIEW PETITION AND BRIEF ON BEHALF OF SOO LINE RAILROAD COMPANY AND CONAGRA, INCORPORATED, INTERVENORS IN SUPPORT OF RESPONDENT

BY LOUIS A. H. PEPPER
36 West 44 Street
New York, New York 10036
(212) 575-0925
C. HAROLD PETERSON
Soo Line Railroad Company
Soo Line Building
Minneapolis, Minnesota 55440
(612) 332-1261
PETER A. GREENE
1625 K Street, N.W.
Washington, D.C. 20006
(202) 393-3390
Attorneys for Soo Line Railroad Company and ConAgra, Incorporated

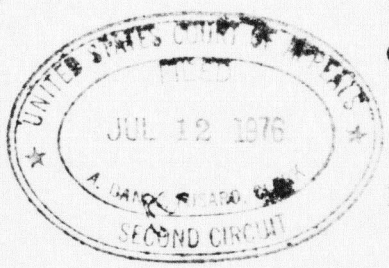

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TABLE OF CONTENTS

		PAGE
I.	Counterstatement of Issues Presented	1
II.	Counterstatement of the Case	2
	A. Preliminary Statement	2
	B. The Proceedings in I. & S. Docket No. 8899	6
III.	Renewal of Motion to Partially Dismiss Petition for Review	17
IV.	Argument Supporting Motion to Partially Dismiss Review Petition	18
	A. Introduction	18
	B. The August 5, 1975 Order Was Administratively Final With Respect to the Rates Therein Found Lawful	21
	C. An "Administratively Final" Order Need Not Be the Last Order Issued by the Commission in a Given Proceeding	24
	D. Administratively Final Orders and Decisions of the Interstate Commerce Commission Are "Reviewable" Orders and Decisions	30
	Conclusion	37
V.	Summary of Arguments on the Merits	39

PAGE

VI. Argument 40

A. The Scope of Judicial Review Is Narrow and Well Defined 40

B. The Contentions of New York and S & E Shipping With Respect to Section 3(4) of the Act Are Not Properly Before This Court Since They Were Not Raised Before the Commission on Reconsideration and, in Any Case, Are Without Merit 43

C. None of the Proposed Unit Train Rates Violates Section 3(1) of the Interstate Commerce Act 54

Conclusion 59

INDEX OF CITATIONS

PAGE

Cases:

American Civil Liberties Union v. F.C.C., 486 F.2d 411 (N.S.C.A. District of Columbia) 28

Baltimore & Ohio R.R. v. United States, 298 U.S. 349, 358-359 (1936) 40

Board of Trade v. United States, 314 U.S. 534, 546 (1942) 42

Consolidated Carriers Corp. v. United States, 321 F.Supp. 1098, 1100 (S.D. N.Y. 1970) aff'd 402 U.S. 901 (1971) 40

Fidelity Television, Inc. v. F.C.C., 502 F.2d 443 (D.C. Cir. 1974) 26, 37

PAGE

Interstate Commerce Commission v. Jersey City, 332 U.S. 503, 512 (1944) 40

Interstate Commerce Commission v. Martin. Bros. Box Co., 219 F.2d 811 (10th Cir. 1955), cert. den. 350 U.S. 823, motion den. 350 U.S. 909 42

Isbrandtsen Co. v. United States, 211 F.2d 51, 55 (D.C. Cir. 1954) 27

Lake Carriers' Association v. United States, 399 F.Supp. 386 (1975) 57, 58

Lee v. Federal Maritime Board, 284 F.2d 577, 580 (9th Cir. 1960) 27

Meat Packers Express, Inc. v. United States, 244 F.Supp. 642 (1965) 32

Microwave Communications, Inc. v. F.C.C., 515 F.2d 385 (D.C. Cir. 1974) 18, 28

Mississippi Valley Barge Line Co. v. United States, 292 U.S. 282, 286-287 (1934) 40, 41

Mt. Sinai Hospital of Greater Miami, Inc. v. Weinberger, D.C. Fla., 376 F.Supp. 1099 (1974) 28

North American Van Lines, Inc. v. I.C.C., 386 F.Supp. 665 (1974) 25

Pennsylvania R. Co. v. United States, 363 U.S. 202, 205 (1959) 25

Public Service Com'n of N.Y. v. F.P.C., 284 F.2d 200 (D.C. Cir. 1960) 19

Resort Bus Lines, Inc. v. I.C.C., 264 F.Supp. 742 (1967) 34, 41

PAGE

Rochester Telephone Corp. v. U.S.,
307 U.S. 125 (1939) 25, 40

Short Line, Inc. v. United States, et al.,
290 F.Supp. 939 (D.R.I. 1968) 42

Slay Transportation Co., Inc. v. United States,
353 F.Supp. 555 (E.D. Mo. 1973) 44

Smyth v. United States, 293 F.Suppp. 387
(1968) 31

State of Arizona v. United States,
220 F.Supp. 337 (1963) 22

Transamerican Freight Lines, Inc. v. United States,
258 F.Supp. 910 (1966) 33

Transit Homes, Inc. v. U.S., 299 F.Supp. 950, 956
(D.S.C. 1969) 22, 45

United States v. Allegheny-Ludlum Steel,
406 U.S. 742 (1971) 25

United States v. L. A. Trucker Truck Lines,
344 U.S. 33, 97 L.Ed. 54 (1952) 44

United States v. Pierce Auto Freight Lines, Inc.,
327 U.S. 515, 534-536 (1946) 40

Virginia Railway Co. v. United States,
272 U.S. 658, 663-666 (1926) 40

Wilson v. United States, 114 F.Supp. 814
(1953) 29

PAGE

Interstate Commerce Commission Decisions:

Unit Train Rates on Wheat, Minn. & Wisc. to Martins Creek, Pa. 1, 3

Initial Decision, 346 I.C.C. 815 13, 14, 15, 47, 54, 55

February 11, 1976 Decision, 351 I.C.C. 473 16, 56

Ingot Molds, Ohio & Pa. to Cypress, Tex., 349 I.C.C. 102 (1975) 51, 52

Investigation of Adequacy of Railroad Freight Car Ownership, Car Utilization, Distribution, Rules and Practices, Ex Parte No. 241, 335 I.C.C. 264 (1969) 24

Wheat, in Multiple Car Shipment, Minn. & Wisc. to Buffalo, Docket No. 34381 (Unreported) 11

STATUTES

Interstate Commerce Act:

49 U.S.C. §3(1) 2, 4, 6, 54

49 U.S.C. §3(4) 2, 6, 43

49 U.S.C. §6 3

49 U.S.C. §13(1) 37

49 U.S.C. §15(1) 36

49 U.S.C. §16(6) 35

49 U.S.C. §17(7) 30

49 U.S.C. §17(9) 22, 31, 33, 34, 45

49 U.S.C. §17(16) 21, 35

Federal Communications Act:

47 U.S.C. §402(a) 29

47 U.S.C. §405 29

PAGE

Administrative Appellate Procedure Act:

28 U.S.C. §2321 18

28 U.S.C. §2342(5) 17

28 U.S.C. §2344 . . . . . 16, 17, 18

28 U.S.C. §2348 7

Rule 27(a) 17

Code of Federal Regulations:

I.C.C. General Rules of Practice

§1.101(a)(4) 32, 34, 35

§1100.19 48

§1100.42 7

§1100.101(a)(2) 21, 22

§1100.101(a)(3) 21, 22

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I. COUNTER STATEMENT OF ISSUES PRESENTED

This petition for review of three orders of the Interstate Commerce Commission, entered in its Docket No. I & S 8899, *Unit Train Rates On Wheat, Minn. & Wisc. To Martins Creek, Pa.*, presents both procedural and substantive issues for consideration by the Court.

Procedurally the petition presents two questions. First, are two of the three order to which the petition is directed (i.e. those of July 18, 1974 and August 5, 1975) subject to review by the Court at this time? Second, in view of the failure of any party before the Commission to pursue to the extent authorized under the Commission's procedures the allegations

that the rates approved by the Commission in the proceeding below are violative of Section 3(4) of the Interstate Commerce Act [49 U.S.C. 3(4)], or unduly prejudicial to Great Lakes carriers can those allegations now be considered by the Court?

Substantively, the fundamental issue presented is whether the Commission's determination that the rates approved in the proceeding below are not violative of Sections 3(1) and 3(4) of the Interstate Commerce Act [49 U.S.C. 3(1) and 3(4)] was so lacking in evidentiary support, so irrational, so arbitrary and capricious, or so obviously beyond the Commission's statutory authority as to require that it be set aside by the Court.

II. COUNTERSTATEMENT OF THE CASE*

A. Preliminary Statement

On March 29, 1976 the State of New York (hereinafter

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* While Parts V, VI and VIII of New York's brief are generally accurate, they are incomplete and otherwise deficient in numerous respects. The lengthy "Statement of the Case and Summary of Arguments" set forth at pages 8-21a of S&E Shipping's brief fails completely to comport with Rule 28 of the Federal Rules of Appellate Procedure and should be stricken for non-compliance with Rule 28(1) of the United States Court of Appeals for the Second Circuit which provides that "briefs must be compact, logically arranged with proper headings, concise and free from burdensome, irrelevant, immaterial and scandalous matter." Pages 8-21a of Shipping's brief are replete with burdensome, irrelevant and immaterial factual assertions which are completely dehors the Commission's record and liberally sprinkled with pejorative phrases such as "shrewdly, ConAgra", "the Soo Erie hotshot rate", "the case is simply one of raw power by a stronger mode musceling (sic) out an established carrier of another mode", etc. S&E Shipping's brief contains absolutely no references to the record as required by Rule 28(e). Indeed, few such references could be made since most of the alleged facts could not be found in the Commission's record.

The Counterstatement of the Case set forth herein which is necessarily quite lengthy will rectify the deficiencies in the petitioners' statements of the case and provide the Court an adequate factual basis upon which to evaluate the arguments set forth herein supporting both Intervenors' Motion to Dismiss and their prayer to deny New York's review petition on the merits.

"New York") petitioned this court for review of three orders of the Interstate Commerce Commission in a proceeding entitled, *Unit Train Rates on Wheat, Minn. & Wisc. to Martins Creek, Pa.*, Investigation and Suspension Docket No. 8899. These orders were served respectively on July 18, 1974, August 5, 1975 and February 11, 1976. Soo Line Railroad Company (hereinafter "Soo Line"), ConAgra, Inc. (hereinafter "ConAgra"), and the State of Pennsylvania (hereinafter "Pennsylvania"), parties to the Commission proceedings, have been permitted by the Court to intervene in the review proceeding in support of the defendants, the United States of America and the Interstate Commerce Commission. S & E Shipping Corp., which was neither a party nor a successor in interest to any part in the Commission proceedings*, was permitted by the Court to intervene in support of the petitioner.

In the Commission proceedings the ICC ultimately found lawful four unit train rates on wheat published by Soo Line and the Erie Lackawanna Railroad Company from the Twin Cities of Minneapolis and St. Paul, Minnesota and the Twin Ports of Duluth, Minnesota and Superior, Wisconsin to Martins Creek, Pennsylvania. The original levels of these seasonal rates, as published pursuant to §6 of the Interstate Commerce Act [49 U.S.C. §6] are shown in Table 1.

TABLE I

Origin	Summer Rates* (Per cwt.)	Winter Rates** (Per cwt.)
Twin Cities	72.25¢	88¢
Twin Ports	72.25¢	88¢

* Effective April 1 - December 14

** Effective December 15 - March 31

* See discussion at pp. 7-8, *infra*.

The first of three orders which New York seeks to have reviewed by the Court was an Initial Decision rendered by Division 2 on July 18, 1974. The Initial Decision found the proposed summer and winter rates from the Twin Ports and the proposed winter rate from the Twin Cities to be lawful. A majority of Division 2 also found that the proposed summer rate from the Twin Cities to Martins Creek was unduly preferential to the Twin Cities, unduly prejudicial to the Twin Ports and constituted a destructive competitive practice.

Pursuant to the Commission's General Rules of Practice, New York, Lake Carrier's Association (hereinafter "Lake Carriers") and the Board of Trade of Chicago (hereinafter "Chicago Board") petitioned the Commission for reconsideration of its Initial Decision holding that three of the four rates involved in the Commission proceedings were lawful. New York's petition for reconsideration, No. 179, Certified Index to the Record (hereinafter "CIR"), asserted but two grounds for reconsideration; namely, (1) "The 72.25—cent rate violates section 3(1) of the Act" and 2) "ERIE'S NET REVENUE POSITION WILL BE WORSENSED BY THE PROPOSAL".

Lake Carrier's petition for reconsideration (No. 164, CIR) stated at the outset:

> "Protestant Lake Carrier's Association accepts respondents premise that, in setting the level of the proposed rates, respondents do not intend to go any lower than necessary to meet the alternative transportation costs available to the shipper. *In essence, as long as the alternative cost to the shipper all-rail versus lake-rail are equivalent, the lake carrier industry has no objection.*" (Emphasis supplied).

Lake Carriers sought reconsideration solely "on the grounds that there have (sic) been a material change of circumstances since conclusion of the hearings on February 5, 1974."*

Chicago Board's petition for reconsideration (No. 177, CIR) alleged that:

> "The published wheat rates applicable from the Twin Ports/Twin Cities to Martins Creek via Soo Line–Chicago–Erie Lackawanna lack a tariff provision to provide Chicago, an intermediate station between origins and destinations via the route of movement, an equal opportunity to utilize the depressed rates for the movement of wheat from Chicago to the flour mill at Martins Creek. Respondents' failure to treat Chicago fairly resulted in violations of section 1(5), 3(1) and 4(1) of the Interstate Commerce Act."**

No other grounds for reconsideration of the Commission's July 18, 1974 order were asserted by any party to the Commission proceedings.

Petitions for reconsideration of the Division 2 majority holding that the Twin Cities summer rate was unlawful were filed by the respondent railroads (No. 176, CIR), ConAgra (No. 178, CIR) and Intervenor Chicago, Rock Island & Pacific Railroad Company (No. 171, CIR).

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* Lake Carriers concluded their petition with the assertion: "If the respondents are sincere in their assertion that they do not intend to go any lower than necessary to meet the alternative transportation costs available to the shipper, it would seem that the all-rail unit train rate from the Twin Ports to Martins Creek should not be pegged any lower than 88¢. . . ." As noted at page 11 of respondents' reply to Lake Carrier's petition for reconsideration (No. 182, CIR), on June 20, 1974 the navigation season rate from the Twin Ports was increased to 89¢ per cwt., *"one cent per cwt. higher than the level recommended by protestant Lake Carriers."*

** By tariff amendment effective December 16, 1974, the four unit train rates to Martins Creek were made effective from all intermediate stations, including Chicago, Illinois, thereby eliminating the objections of the Chicago Board.

The brief which New York filed with the Court on June 10, 1976 in support of its petition for review alleges that "The Commission Erroneously Failed to Protect Water Carriers Transporting Wheat To The Port Of Buffalo As Required by Section 3(4) Of The Act," an issue not sought to be reviewed in *any* petitions for reconsideration of the Commission's July 18, 1974 order. The brief filed with the Court by S&E Shipping raises no legal questions which were submitted to the Commission for reconsideration in the three petitions for reconsideration described above. Thus, the only question the Commission was requested to review in the proceedings before it and the only question, if any,* New York is now entitled to have judicially reviewed, is whether or not any of the four rates found lawful by the commission in the proceedings below have been shown to violate section 3(1) of the Interstate Commerce Act [49 U.S.C. § 3(1)].

B. The Proceedings In I&S Docket No. 8899

In November, 1973 Soo Line and Erie Lackawanna (now part of ConRail) published the unit train rates heretofore described. As a result of Petitions For Suspension and Investigation filed by numerous parties, the Commission suspended these unit train rates to and including May 31, 1974** and launched an investigation into their lawfulness.

By order dated November 20, 1973 (No. 62, CIR), the Commission required parties wishing to present evidence in the case to serve copies of the same on other parties (respondents on December 17, 1973 and protestants on or before January

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* See discussion at pp. 56-57, *infra*.

** The rates have been in effect, subject to frequent escalations as general freight rate increases were authorized by the Commission, since June 1, 1974.

15, 1974) and provided that the matter be heard before an Administrative Law Judge in Washington, D. C. commencing on January 28, 1974. As of that date the parties to the proceeding included the railroad respondents, and ConAgra in support of the proposed rates and numerous flour mills, Penn Central Transportation Company, Lake Carriers' Association, Board of Trade of the City of Chicago, Seaway Port Authority of Duluth, International Association of Great Lakes Ports, Buffalo Area Chamber of Commerce, Mayor of the City of Buffalo, County of Erie, New York, Niagara Frontier Transportation Authority and the Board of Trade of Kansas City, Missouri, as protestants.

While S&E Shipping has represented to this Court in its Motion for Leave to Intervene that it "is the successor in interest to the Kinsman Marine Transit Company, which was a party to this proceeding", Kinsman Marine was *not* a party to the Commission proceedings.* Kinsman Marine did file a "Protest and Petition for Suspension and Investigation" (No. 11, CIR) of the proposed rates on October 23, 1973, pursuant to Rule 42 of the Commission's General Rules of Practice, §1100.42 of the Code of Federal Regulations.** However, by letter filed with the Commission on January 16, 1974 counsel for Kinsman Marine advised the Commission that it is "withdrawing as a party to the proceeding. Kinsman will pursue

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* Consequently, S&E Shipping has no right to any participation in this review proceeding. 28 U.S.C. §2348 only provides for intervention by "*any party in interest in the proceeding before the agency* whose interests will be affected . . ." (Emphasis supplied)

** As noted at page 49, *infra,* under the Commission's General Rules of practice, a suspension petition is not a pleading and its contents do not constitute evidence in the commission proceedings.

its interests in this matter as a member of the Lake Carrier's Association, another protestant in this proceeding." (No. 83, CIR).*

The hearing before the Commission was vigorously contested by the proponents of the proposed rates and their principal adversaries, the Buffalo milling interests and Penn Central. Cross-examination of witnesses sponsoring a total of 39 exhibits, many of them lengthy prepared statements, consumed the better part of seven hearing days.

The principal railroad respondent evidence setting forth the economic background of grain transportation from North Central to the Eastern region of the United States and explaining the carriers' justification for the proposed rates is summarized as follows:**

Historically, Buffalo, New York, has been the largest flour milling complex in the United States. Its predominant position in the flour milling market has been maintained in recent years. This position is the result of two major advantages. First, the Buffalo flour mills, unlike many of their principal competitors, are located adjacent to the major flour consuming market in the United States; namely, the North Atlantic states. Second, geographic location permits Buffalo mills to draw wheat from all of the principal producing areas.

The two primary types of wheat are (1) hard red winter wheat, produced in the states of Texas, Oklahoma, Kansas,

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* Subsequent to January 16, 1974, Kinsman Marine did not attempt to participate in the Commission proceedings in any fashion. No witness testified on its behalf. It filed no brief, petitions for reconsideration or replies to the petitions for reconsideration filed by respondent railroads and ConAgra. Furthermore as noted at p. 5, *supra*, Lake Carriers' petition for reconsideration of the Initial Decision was solely grounded on alleged changed circumstances. It accepted the carriers' contention the proposed rates were merely "equivalent" to "lake-rail" transportation costs.

** This summary is abstracted from Exhibit 1, the testimony of Ray H. Smith, Soo Line Vice President-Traffic, which is reproduced in the appendix.

Nebraska and Colorado and (2) hard northern spring wheat, produced in the states of Minnesota, North Dakota, South Dakota and Montana. Wheat from the former area generally moves through the primary markets of Kansas City or Omaha. Hard northern spring wheat for milling at Buffalo moves through the primary market at Duluth, Minn. Historically, spring wheat purchased by Buffalo mills has moved beyond Duluth by water transportation on the Great Lakes. This transportation is exempt from Interstate Commerce Commission regulation under the bulk commodity exemption contained in Section 303, Part III of the Interstate Commerce Act. Prices for water transportation vary and fluctuate according to relative supply of equipment and demand for transportation.

The availability of this unregulated water transportation is the most important economic factor explaining Buffalo's position as the nation's ranking milling center. The milling capacity at Buffalo and the enormity of the eastern spring wheat flour market served by Buffalo result in a tremendous movement of spring wheat via lake vessels from the Twin Ports to Buffalo. As shown by Table 2 below, approximately 47.5 million bushels of wheat move annually from the Twin Ports to flour mills located on the Great Lakes via water transportation. Table 2 also demonstrates the extent to which the Buffalo mills dominate the market insofar as flour produced from spring wheat is concerned.

TABLE 2

Lake Shipments of Domestic Wheat From Duluth-Superior for Years Shown (in bushels)

Year	Buffalo Tonnage	Total Tonnage
1965	44,192,000	46,979,000
1966	51,826,000	57,821,000
1967	36,736,000	40,810,000
1968	40,730,000	44,151,000
1969	44,072,000	48,310,000
1970	43,814,000	47,572,000
1971	47,082,000	47,714,000
1972	45,058,000	45,322,000

Source: DULUTH BOARD OF TRADE ANNUAL REPORTS

Prior to 1964 exempt water transportation charges were at such a level as to preclude rail carriers from participation in the transportation of wheat moving from Duluth to Buffalo. Rail carriers were a standby mode, occasionally moving nominal tonnages during the winter months but only when wintertime demand for spring wheat exceeded prior estimates and flour mills could not await availability of water transportation commencing in April of each year.

In December, 1963, the single car all-rail wheat freight rate from Duluth to Buffalo was 72 1/2¢ per cwt., approximately three times higher than the average charge assessed by the exempt water carriers for transporting wheat between the same points.

In January, 1964, intervenor Soo Line herein and others attempted to compete with the unregulated water carriers for a small portion of the wheat which historically had moved from Duluth to Buffalo via water. This competitive effort in-

volved publication of a unit train rate of 33 1/2¢ per cwt., approximately 54 percent lower than the then existing single car rate. The publication included both the Twin Cities and the Twin Ports as origin areas.

Before publishing the Buffalo unit train rate, the railroads made a thorough evaluation of total costs incidental to the transportation of wheat by water and they determined that a small portion of the Great Lakes tonnage could be diverted to rail movement, displacing some of the wheat which the millers were requested to store in Buffalo elevators during the season of each year when the Great Lakes were frozen over. The railroads realized at that time that they could not compete effectively with the unregulated water carriers for transportation of grain moving from Duluth to Buffalo during the navigation season.

Effective January 8, 1964, the Soo Line and the Pennsylvania Railroad Company published the unit train rate referred to above in Soo Line Freight Tariff 526-B, I.C.C. 7633. This rate was the subject of numerous suspension petitions filed by many of the interests seeking suspension of the instant rate, and others. As previously noted, in the face of these protests the Commission refused to suspend the Buffalo unit train rate and in *Wheat in Multiple Car Shipments, Minn. & Wis. to Buffalo,* Docket No. 34381 (unreported), the Commission found the Buffalo unit train rate was "just, reasonable and not otherwise unlawful."

The Buffalo unit train rate accomplished, in part, its limited purpose of displacing a portion of the winter storage wheat which had previously moved over the Great Lakes. Thus, to illustrate, during the years 1969-1973 an approximate average of 5.7 million bushels of wheat moved annually under the unit train rate. This volume was slightly less than the average

amount of wheat moved over the Great Lakes and held in winter storage during this three-year period.

The Buffalo unit train rate fulfilled none of the dire predictions of those seeking its suspension that its publication would destroy the shipping capacity of Great Lakes carriers, would cause widespread unemployment and would entirely disrupt the eastern territory marketing of flour produced in eastern and central United States regions.

To the contrary, the facts are:

(1) The Buffalo unit train rate has moved an average of 6.7 million bushels of grain per year which would otherwise move by water, approximately 8.7% of the 65,000,000 bushels of grain moving annually over the Great Lakes in domestic service. The Martins Creek unit train rate will move an additional 3.5 million bushels of wheat which would otherwise move in unregulated vessels to Buffalo. Again, this represents approximately 3% of the total domestic grain tonnage moving annually over the Great Lakes and belies the suggestion of unregulated water carrier interests that the Martins Creek rate will cripple their capacity to move grain and other exempt commodities and that thousands of Buffalo based laborers will lose employment.

(2) Because the Buffalo unit train rate merely met the alternative costs available to Buffalo mills by unregulated carriage there is no way it could have affected the market price of flour laid down in New York, Philadelphia, and other large eastern population centers. The Buffalo millers' ability to market flour at a given price level was determined primarily by their water transportation costs and the sole question raised by publication of the Buffalo unit train rate was whether or not a small portion of that traffic would move pursuant to a regulated unit train rate, reflecting approximately the same

costs as those involved in lake transportation and winter storage of Duluth wheat.

The Buffalo unit train tariff has remained in effect in substantially the same form as originally published, but expanded to include other small grains, for approximately ten years. The present rate at the Ex Parte 299 level in effect on November 1, 1973 was 43¢ per cwt.*

The proposed Martins Creek rates were patterned, as closely as circumstances would permit, after the Buffalo rate. At the 88¢ level in effect during the Great Lakes non-navigation season (December 15 through March 31) the proposed rates precisely meet the costs which ConAgra incurs in moving wheat from the Twin Ports or Twin Cities via the Buffalo unit train rate (43¢ per cwt.), the Buffalo elevation cost (5¢ per cwt.) and the Erie's five car rail rate from Buffalo to Martins Creek (40¢ per cwt.).

The proposed rates, at the 72.25 cent level, meet as precisely as can be calculated the costs which ConAgra would incur during the Great Lakes navigation season in moving wheat via exempt water carriers from Duluth to Buffalo (26¢ per cwt.), Buffalo elevation costs (5 cents per cwt.) and the Buffalo-Martins Creek five car rate (40 cents per cwt.). *The proposed rates at either the 72.25¢ or the 88¢ level exceed ConAgra's alternative costs if the Buffalo-Martins Creek movement is handled by exempt motor carriers.*

The essential positions urged upon the Commission by various protestants during the course of the hearings are briefly and accurately summarized in the Initial Decision at 346 I.C.C. 829, as follows:

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* Actually, the great preponderance of wheat shipped to Buffalo by unit train during the 1973-4 shipping season moved at 41¢ per cwt. (See Appendix, Tr. 1188.)

DISCUSSION AND CONCLUSIONS

"This proceeding pits respondent rail carriers and the supporting shipper against six flour mills, a large rail carrier, a group of water carriers operating on the Great Lakes, port and commercial interests at Duluth and Buffalo, and the Chicago Board of Trade. At issue is a unit train rate on wheat from Twin Ports and Twin Cities to Martins Creek, Pa., which protestants collectively see as depleting the net revenue position of respondent Erie, hurting the flour mills protestants in the sale of flour in the eastern marketing area, worsening the financial plight of the eastern railroads, destructive of the inherent advantage of water transportation on the Great Lakes and of the ports and communities which are sustained by this mode of service, prejudicial to Twin Ports and preferential of Twin Cities, and violative of section 4(1) in that the proposed rates are not made applicable at the intermediate origin of Chicago. The one issue pressed by most protestants, but in particular by the flour mills who devoted more than half of their lengthy brief to the subject, is that under the proposed rates Erie will be competing against itself and, taking into account all evidence of record, respondent will be worse off financially if the proposed rates are approved than it would be without them.

"From the opening of the Martins Creek mill in May 1973* ConAgra has obtained wheat from two elevators in Buffalo."

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* At pages 11-12 of its brief, S&E Shipping, erroneously implies that ConAgra's Martins Creek mill didn't open until the proposed rates became effective on June 1, 1974.

While the record in the Commission proceedings was voluminous, as previously noted, only two verified statements were submitted by parties actually or purportedly represented by or affiliated with State of New York* and S&E Shipping. These statements, identified as Exhibits No. 6 and No. 29** are reproduced in their entirety in the appendix.

After affording all parties an opportunity to file briefs, Division 2 of the Commission rendered its Initial Decision on July 18, 1974. As previously noted that Decision found the summer and winter rates from the Twin Ports and the winter rate from the Twin Cities to be lawful. Two of the 3 members of Division 2 made a contrary finding with respect to the summer rate from the Twin Cities.*** Subsequently, New York and the Rock Island Railroad were permitted to intervene in these

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* While New York states in Part VII of its brief to the Court that it "stands in *parens patria* to the vessels calling at ports in New York State and the millers located in New York state . . .", in fact New York is only authorized to represent

> "the Mayor of the City of Buffalo, the County of Erie, the Niagara Frontier Transportation Authority, an agency of the State of New York, and the Buffalo Area Chamber of Commerce.
>
> "The limited resources of those parties and their many responsibilities in the many other matters makes unfeasible their further active participation in this proceeding. Therefore, the State of New York, as *parens patria* has undertaken to represent their interests, which in this case are the interests of the State as a whole. The intervention of the State of New York will prejudice no one, since the State will not in any way broaden the issues in this proceeding and other petitions for reconsideration will be filed." (New York's Petition for Leave to Intervene in the Commission proceedings, No. 160, CIR).

** Exhibit 29, offered by Lake Carriers' Conference, is reproduced because No. 83, CIR alleges that S&E Shipping is a member of that Association.

*** Commissioner Hardin dissented from this holding, stating: "I disagree with the majority's holding that the maintenance of identical rates from the Twin Ports and Twin Cities to Martins Creeks during the open navigation season is unduly preferential to inland points and unduly prejudicial to Twin Ports, or is otherwise unlawful." (346 I.C.C. 856)

proceedings and to petition the Commission for reconsideration of the July 18, 1974 order and Pennsylvania was permitted to intervene and reply to New York's petition.

The August 5, 1975 order of the Commission's Division 2, "acting as an Appellate Division," (No. 158, CIR) unanimously affirmed the Initial Decision finding that the rates from the Twin Ports and the winter rate from the Twin Cities to Martins Creek were lawful and unanimously granted the petitions for reconsideration filed by railroad respondents, ConAgra and Rock Island, for reconsideration of the lawfulness of the summer rate from the Twin Cities "on the present record". As shown by the Commission's Certified Index of the Record, no petitions for reconsideration of the Commission's August 5, 1975 order were filed by any party to the Commission's proceeding.

By Report and order decided January 27 and served February 11, 1976 Division 2, again "acting as an Appellate Division"* unanimously agreed with the carriers' and ConAgra's contention that the Initial Decision "erred in finding the proposed unit-train rate applicable from the Twin Cities during open navigation season to be unlawful" (351 I.C.C. 473) and it adopted ultimate findings reversing that part of the Initial Decision.

New York's Petition for review of the Commission's February 11, 1976 order was timely filed under §2344 of Title 28, U.S.C.

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* At the time the Initial Decision was rendered Commissioners Brown, Hardin and Clapp comprised the membership of Division 2. The August 11, 1975 order and the February 11, 1976 order were decided by Commissioners Brown, MacFarland and Corber, the then current members of Division 2. Mrs. Brown was the only Commissioner serving on Division 2 throughout the proceedings below.

III. RENEWAL OF MOTION TO PARTIALLY DISMISS PETITION FOR REVIEW

On May 28, 1976 Soo Line and ConAgra filed with the Court a motion to dismiss that part of New York's Petition which sought judicial review of the Commission's Initial Decision served July 18, 1974 and the August 5, 1975 order issued by Division 2 in an Appellate capacity. Memoranda supporting and opposing said motion were filed and the motion was orally argued before the Court on June 15, 1976.

At the conclusion of the oral argument the Court denied the motion to dismiss without prejudice to renewing the same in these intervenors' brief and at the time of oral argument on the merits.

Intervenors Soo Line and ConAgra respectfully renew their motion, pursuant to Rule 27 (a) of the Federal Rules of Appellate Procedure, for an order dismissing the Petition insofar as it seeks review of:

(1) The order of respondent, Interstate Commerce Commission, served July 18, 1974. This was not a final order within the provisions of 28 U.S.C., §2344, and as such this Court is without jurisdiction pursuant to the provisions of 28 U.S.C. §2342(5).

(2) The order of respondent, Interstate Commerce Commission, served August 5, 1975. This was a final order within the provisions of 28, U.S.C. §2344, and as such the petition for review of this order is in contravention of the provisions of 28 U.S.C. §2344, which requires the filing of a review petition within 60 days after entry of such an order. Consequently, New York's petition only vests this Court with jurisdiction to review the lawfulness of the summer rate from the Twin Cities to Martins Creek, the only rate dealt with in the Commission's 1976 decision.

IV. ARGUMENT SUPPORTING MOTION TO PARTIALLY DISMISS REVIEW PETITION

A. Introduction.

Since February 1, 1975 judicial review of Interstate Commission orders and decisions has been governed by the Hobbs Act, 28 U.S.C. §2321. §2344 of Title 28 provides for judicial review of "a *final* order reviewable under this chapter". (Emphasis supplied). The second sentence of §2344 states:

> "Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the Court of Appeals wherein venue lies."

The §2344 mandate that review petitions be filed within sixty days of the entry of a final order is clearly jurisdictional. In *Microwave Communications, Inc. v. F.C.C.*, 515 F.2d 385 (1974), the United States Court of Appeals, District of Columbia Circuit, denied a motion to dismiss a petition for review which was filed with the court more than sixty days after "public notice" of the order had been given by the FCC, but less than sixty days after the complete text of the order became available to the litigants. However, the Court stated, at 515 F.2d 388-9:

> "A petition for review of an order which the Commission declines to rehear *must* be filed within 60 days after 'public notice' of the order or orders disposing of all petitions for rehearing.' (Emphasis supplied).
>
> "Jurisdiction to review Section 402 (a) orders must be invoked by a petition for review,[15*] and the petition

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15* "Jurisdiction is invoked by filing a petition as provided by section 2344 of this title."

must meet specified requirements,[16*] *one of which is timeliness of filing.*[17*]" (Emphasis supplied).

16*.17* Footnotes omitted.

In *Public Service Com'n of N.Y. v. F.P.C.*, 284 F.2d 200 (1960) the United States Court of Appeals, District of Columbia Circuit, denied the New York Commission's petition for review under the following circumstances:

New York's petition for intervention in the FPC proceedings was denied by the Commission on March 26, 1959. Subsequently, following the issuance of a final order in the proceeding which was adverse to the New York Commission's interest, New York renewed its application for intervention and also sought reconsideration of the last order. The F.P.C. rejected those applications and the New York Commission, within 60 days of the final FPC order, petitioned for review. In dismissing the petition for review, the Court stated, at 284 F.2d 204:

> "We think a would-be intervenor is aggrieved, within the meaning of the statute, when its application to intervene is denied. It is true that he is not then aggrieved in the sense that a determination has been made on the merits contrary to his interests. But he most certainly is aggrieved in the sense that his right to represent his interests before the Commission has been finally determined.[4*]
>
> "[3] It follows . . . that the New York Commission had a right to petition for review of the order of March 26th, which was the order which finally denied its application for intervention and denied reconsideration thereof. *Since it had a right to file a petition at that point, the*

4*.5* Footnotes omitted.

statute limited to 60 days the period within which it must exercise that right. Its failure to file such a petition was not rectified by the later renewal of the application to intervene and the petition to review the rejection of that application.[5]* (Emphasis supplied).

In responses which New York and S & E Shipping filed in opposition to these intervenor's jointly sponsored motion to partially dismiss and in their oral argument to the Court, both parties conceded that the Commission's July 18, 1974 and August 5, 1975 orders were not judicially reviewable. New York's answer states:

> "It is a procedural order served August 5, 1975 that intervenors seek to promote as a final order of the Commission", and
>
> "Admittedly the order served July 18, 1974 was not a final order". (pp. 1-2)

While New York's contention the August 5 order was merely procedural is clearly incorrect, the Court's jurisdiction to review *said* order could not be invoked by New York's petition for review which was filed March 28, 1976, over seven months after its "entry" by the Commission.*

The critically important issue which the court must resolve in disposing of the motion to partially dismiss is: *which of the four rates found lawful by the Commission in the Martins Creek case is New York entitled to have judicially reviewed by this Court.* The answer to that question must be found by determining when the Commission's orders as to specific rates became administratively final.

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* Categorically, a review petition filed with this Court on March 28, 1976 does not vest the Court with power to review *any* ICC order entered more than 60 days prior thereto.

B. The August 5, 1975 Order was Administratively Final with Respect to the Rates Therein Found Lawful.

The Commission's General Rules of Practice are published in Part 1100 of the Code of Federal Regulations. §1100.101 (a) (2) and (3) provide:

"(2) *Administrative finality of division and employee board decisions.* All decisions, orders, or requirements of a division of the Commission in any proceeding shall be considered administratively final, except those involving issues of general transportation importance, those wherein the division reverses, changes, or modifies a prior decision by a hearing officer, and those wherein the initial decision is made by a division: *Provided, however,* That this subparagraph shall not preclude the seasonable filing of a petition for relief under paragraphs (b) and (c) of this section, to be considered and disposed of by the division or appellate division which made the decision, order, or requirement as to which relief is sought. Decisions of an employee board, whether original or on review, are not administratively final. Such employee board decisions shall be subject to review by an appropriate appellate division of the Commission upon the filing of a timely petition in accordance with these rules of practice."

"(3) *Limitations on petitions for review of division decisions.* Pursuant to authority granted in section 17(6) of the Interstate Commerce Act, the right to apply to the entire Commission for rehearing, reargument, or reconsideration of a decision, order, or requirement of a division of the Commission in any proceeding shall be limited and restricted to those proceedings in which the entire

Commission, on its own motion, determines and announces that an issue of general transportation importance is involved. In proceedings in which no such announcement has been made, but in which a division reverses, changes, or modifies a prior decision by a hearing officer or where the initial decision is made by a division, *a petition to the same division for* rehearing, reargument, or *reconsideration* of its decision will be permitted and *will be considered and disposed of by such division in an appellate capacity and with administrative finality.*" (Emphasis supplied.)

The Commission's August 5, 1975 order, as previously noted, affirmed its prior July 18, 1974 order in all respects so far as the winter rate from the Twin Cities and the winter and summer rates from the Twin Ports were concerned. Thus, under §1100.101 (a) (2) and (3) the August 5 order was "administratively final" as to those rates, even though concurrently the proceeding was reopened on the present record to consider the lawfulness of the summer rate from the Twin Cities. The Commission would have summarily rejected any further petition for reconsideration, had one been filed. The Commission's rules simply do not permit such a filing.*

In *State of Arizona v. United States*, 220 F.Supp. 337 (1963), wherein this precise point was discussed, the United States District Court for Arizona reviewed a final I.C.C. order authorizing the Southern Pacific Co. to abandon a Branch line.

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* Even assuming arguendo, as petitioner contends, the order was not administratively final, petitioner would still be foreclosed from obtaining review by this Court by virtue of the fact that reconsideration of the order was never sought, since Section 17(9) of the Interstate Commerce Act [49 U.S.C. 17(9)] requires that such reconsideration be sought before judicial review can be obtained. (See Transit Homes, Inc. v. U.S., 299 F.Supp. 950, 956 (D.S.C. 1969)).

The party seeking review of the Commission order simultaneously petitioned the entire Commission for reconsideration of the same order. As shown by the Court's opinion, at 220 F.Supp. 339-40, the petition for reconsideration was not accepted for filing by the Commission:

> "The present suit was filed by plaintiffs in this court on December 18, 1961. Simultaneously, plaintiffs attempted to file a petition for reconsideration with the Commission of the decision of Division 3. The petition was received at the Commission on December 18. The copies of the petition were returned to counsel for plaintiffs by the Secretary of the Commission who stated that the decision of Division 3 had become administratively final pursuant to Rule 1.101 of the Commission's General Rules of Practice. The Secretary further explained his action in a letter to Mr. Daniel Moore, counsel for plaintiffs, of January 10, 1962, stating in pertinent part:
>
> " 'As you know, the Commission declined to declare this proceeding as one of general transportation importance, and the initial decision herein was made by a hearing examiner rather than by the Division. As you will also note, by comparing the report and recommended certificate of the hearing examiner with the report and certificate of the Division, there were no reversals, changes, or modifications of any of the hearing examiner's conclusions, or of his ultimate decision, by the Division. Such changes or modifications as were made by the Division were only minor in nature and were actually made only to the hearing examiner's statements of fact. They were of such nature as to have no material effect upon his decision, which was concurred in without modification by the Division.

" 'Inasmuch as the General Rules of Practice provide for the administrative finality of the Division's decisions, there is no necessity for the Division to announce such fact in each individual decision.

" 'In view of the facts that the proceeding has not been declared to be of general transportation importance, there was no reversal, change, or modification of the hearing examiner's decision, and the initial decision was not made by the Division, *the Division's decision is administratively final, as provided for by the Commission's General Rules of Practice and I am without authority to accept the petition for reconsideration.* Accordingly, I had no alternative to returning the petition to Mr. Blaine as an enclosure to my letter to him of December 20, 1961.' " (Emphasis supplied.)

C. An "Administratively Final" Order Need Not Be the Last Order Issued By the Commission in a Given Proceeding.

The Interstate Commerce Commission has many "ongoing" proceedings wherein specific final orders are rendered from time to time but the proceedings remain open indefinitely. Thus, for example, Ex Parte No. 241, *Investigation of Adequacy of Railroad Freight Car Ownership, Car Utilization, Distribution, Rules and Practices* has been pending before the Commission for at least 12 years. The proceeding is still active, the Commission presently having under consideration proposed rules and regulations which would require specific railroads to acquire thousands of freight cars. However, a particular final order of the Commission in Ex Parte No. 241, rendered August 21, 1969, has been judicially reviewed.* See

* This decision is reported in 335 ICC 264.

United States v. Alleghany-Ludlum Steel, 406 U.S. 742 (1971). Many other examples of this type of ongoing ICC proceedings, involving freight rates, per diem charges, services, etc. could be cited, wherein particular orders were judicially reviewed while the proceedings remained open.

The Martins Creek unit train rate case was also an ongoing proceeding as of August 5, 1975, although the Commission's order of that date was administratively final as to three of the four rates involved in the proceeding.

In *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 131-132 (1939), the Supreme Court held that while a mere "abstract declaration" on some issue by the Commission may not be judicially reviewable, an order that determines a "right or obligation" so that "legal remedies" will flow from it is reviewable. See also *Pennsylvania R. Co. v. United States*, 363 U.S. 202, 205 (1959).

In *North American Van Lines, Inc. v. I.C.C.*, 386 F. Supp. 665 (1974), the Plaintiff sought a writ of mandamus to require the Interstate Commerce Commission to rule on its pending applications for motor carrier certificates of public convenience and necessity. The Indiana District Court held that while the Commission may hold certain applications for new authority in abeyance pending a fitness investigation, the Commission did not have power to institute a rule withholding all certificate applications any time and every time that there is a carrier investigation pending, regardless of facts concerning the individual application. The Court stated, at 386 F. Supp. 684:

> "The final criteria which the plaintiff seeking a mandamus remedy in this case must meet is that concerning what is usually termed the 'exhaustion of administrative remedies'. . . .

"The present action is unusual, however, because defendant Commission is not making the 'exhaustion of administrative remedies' argument in the usual sense that plaintiff should await the final administrative outcome in the certificate application cases before obtaining judicial review. This, of course, would not be a proper argument when administrative delay is itself claimed to be the source of the injury alleged. (Citation omitted). As the Commission concedes in its posthearing brief, an interlocutory decision to delay must be appealable without awaiting the ultimate Commission decision if the aggrieved party is to realistically have an adequate remedy. See L. Jaffe, Judicial Control of Administrative Action 426-32 (1965)."

In *Fidelity Television, Inc. v. F.C.C.*, 502 F.2d 443 (1974), the United States Court of Appeals, District of Columbia Circuit, considered the reviewability of an FCC order in the light of a statutory provision that "[a]gency action made reviewable by statute and final agency action for which there is not adequate remedy in a court are subject to judicial review . . ." The Court in affirming Fidelity's right to review stated, at 502 F.2d 448:

"[1] The principle of finality in administrative law is not . . . governed by the administrative agency's characterization of its action, but rather by a realistic assessment of the nature and effect of the order sought to be reviewed.[24*] Hence, 'a final order need not necessarily be the very last order' in an agency proceeding,[25*] but rather, is final for purposes of judicial review when it

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[24*] Citing *Isbrandtsen Co. v. United tSates*, 211 F.2d 51, 55, Cert. denied, 347 U.S. 990.

[25*] Footnote omitted.

'imposes[s] an obligation, den[ies] a right, or fix[es] some legal relationship as a consummation of the administrative process.[26*] The Commission's appraisal of its order ignores these principles and the immediate and continuing impact of the order on Fidelity."

[26*] Footnote omitted.

In *Isbrandtsen Co. v. United States*, 211 F.2d 51, 55 (1954), the United States Court of Appeals, District of Columbia Circuit, stated:

"This court has jurisdiction to review only final orders of the Board.[14*] Whether or not the statutory requirements of finality are satisfied in any given case depends not upon the label affixed to its action by the administrative agency, but rather upon a realistic appraisal of the consequences of such action. 'The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control.'[15*] Thus, administrative orders are ordinarily reviewable when 'they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process.'[16] *Under this test, a final order need not necessarily be the very last order.*"[17*] (Emphasis supplied.)

[14*-17*] Footnotes omitted.

The Court's definition of "finality" in the *Isbrandtsen* case has been followed in other circuits. See *Lee v. Federal Maritime Board*, 284 F.2d 577, 580 (1960) (Ninth Circuit). See

also *Mt. Sinai Hospital of Greater Miami, Inc. v. Weinberger*, D.C. Fla., 376 F. Supp. 1099 (1974), reversed on other grounds at 517 F.2d 329. In the *Mt. Sinai* case the Court stated, at 376 F. Supp. 1118:

> "In accord with the presumption of reviewability mandated by the APA, '[t]he cases dealing with judicial review of administrative actions have interpreted the 'finality' element in a pragmatic way.' *Abbot Laboratories v. Gardner*, 387 U.S. at 149. In keeping with this functional approach, *an agency order need not be the very last administrative ruling in order to be deemed a 'final' one. Isbrandtsen Co. v. United States*, 93 U.S. App. D.C. 293, 211 F.2d 51, cert. denied sub nom. *Japan-Atlantic & Gulf Conf. v. United States*, 347 U.S. 990, 74 S.Ct. 852, 98 L.Ed. 1124 (1954). Moreover, it is not the label affixed to its action by an agency that is determinative of finality, but a realistic appraisal of the consequences of exercising jurisdiction to permit appeal. *Isbrandtsen Co. v. United States*, 211 F.2d at 55." (Emphasis supplied.)

The foregoing argument was set forth virtually verbatim in the memorandum supporting intervenors' initial motion to partially dismiss. New York's memorandum responded thereto with the blanket assertion that "Intervenors cite no cases in point" (page 4). New York proceeded in its memorandum to cite *Microwave Communications, Inc. v. F.C.C.*, 515 F.2d 385, 388 (U.S.C.A., District of Columbia 1974) and *American Civil Liberties Union v. F.C.C.*, 486 F.2d 411 (N.S.L.A. District of Columbia) decided by the United States Court of Appeals for the District of Columbia, to rebut our movants. New York's reliance on these decisions is totally misplaced. In both cases the Court relied upon the specific provisions of the Communica-

tions Act, 47 U.S.C. §405, which provides that "the time within which a petition for review must be filed in a proceeding to which §402(a) of this Title applies shall be computed from the date upon which public notice is given of orders disposing of *all* petitions for rehearing filed with the Commission." (Emphasis supplied).

Neither the Interstate Commerce Act nor the statutes governing review of I.C.C. orders contains a similar limitation. As the preceding section of this argument demonstrates, if such limitation did exist, review of many I.C.C. final orders would be delayed for many years and in some instances would never occur.

Despite the Communication Act's limitation on judicial review the United States Court of Appeals for the District of Columbia in the *Fidelity Television* case, *supra*, refused to dismiss a petition to review an F.C.C. "final" order which was not the Commission's "last" order.

The only other case cited in New York's responding memorandum is *Wilson v. United States*, 114 F.Supp. 814 (1953). In that case, wherein a litigant sought to annul an I.C.C. order denying a certificate of convenience and necessity, a Missouri United States District Court stated that "the only issue that can legally be adjudicated in this review proceeding is: are the findings and order of the Commission supported by substantial evidence." The case had nothing to do with questions of administrative finality or judicial reviewability.

The only other argument which New York made in its response to intervenor's memorandum to the Court is that acceptance of our position would result in piecemeal judicial review of Commission orders. The simple answer to that contention is that the law *requires* piecemeal review when the Commis-

sion deals with a case in a piecemeal fashion, issuing more than one administratively final order in the case.

D. Administratively Final Orders and Decisions of the Interstate Commerce Commission are "Reviewable" Orders and Decisions.

During the course of argument on the motion to partially dismiss New York's review petition Judge Mansfield raised the question, not discussed in any of the memoranda submitted to the Court, whether an administratively final I.C.C. order was necessarily an order which was ripe for judicial review. The answer to the question is "yes".

49 U.S.C. §17(7) provides:

> "If after rehearing, reargument, or reconsideration of a decision, order, or requirement of a division, an individual Commissioner, or board it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission or appellate division may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after rehearing, reargument, or reconsideration, reversing, changing, or modifying the original determination shall be subject to the same provisions with respect to rehearing, reargument, or reconsideration as an original order."

In the Commission's August 5, 1975 order, Division 2, acting in an appellate capacity, did not reverse, change or modify the prior Division 2 determination that the unit train rates from the Twin Ports and the summer rate from the Twin Cities to Martins Creek were lawful. Rather, it denied the three petitions for reconsideration of the Initial Decision which had

been filed by protestants "because sufficient grounds have not been presented to warrant granting the actions sought'.

Title 49 § 17(9) provides:

> "When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, *but not otherwise.*" (Underscoring and emphasis supplied.)

With respect to the three rates found lawful by Division 2 therein, the August 5, 1975 order was clearly reviewable under §17(9) of the Interstate Commerce Act.

In *Smyth v. United States,* 293 F.Supp. 387 (1968) the District Court for the Western District of Washington, Northern Division, reviewed an Interstate Commerce Commission order denying a motor carrier control application. The Commission's decision indicated the denial was without prejudice to a later application for approval of such acquisition. The Court stated, at 293 F.Supp. 389:

> "Under § 17(9) of the Interstate Commerce Act, 49 U.S.C. § 17(9), and the rules and regulations promulgated thereunder, 49 C.F.R. § 1.101(a) (2) and (3), the denial of the petition for reconsideration by Division 3, acting as an Appellate Division, disposed of the Commission pro-

ceedings with administrative finality and exhausted the administrative remedies of the plaintiffs before the Commission. *That the plaintiffs can bring no more action before the Commission which would, or may, result in the approval of the instant application for the Martin acquisition is clear.* The holding by the Commission that the denial was without prejudice to a later application for approval of acquisition of A. World *and* Martin in no way affects the finality of the action taken on the petition before it exclusively concerning the acquisition of Martin. *Therefore, the plaintiffs have standing under the Administrative Procedure Act and the Interstate Commerce Act to bring this action.*" (Emphasis supplied.)

In *Meat Packers Express, Inc. v. United States*, 244 F.Supp. 642 (1965) the United States District Court for Nebraska reviewed an I.C.C. order denying a motor carrier application for a certificate of public convenience and necessity. An intervening defendant urged the Court not to review the Commission's order because the applicant, prior to seeking review, had failed to file a petition under §1.101(a) (4) of the Commission's General Rules of Practice seeking a finding of an issue of general transportation importance. The Court disagreed, stating at 244 F.Supp. 642:

"The record before this court is sufficient to entitle plaintiff to a review of the Commission's order, and additional efforts directed toward securing a rehearing before the entire Commission were unnecessary insofar as exhaustion of administrative remedies is concerned. Following the hearing examiner's report and recommended order wherein it was concluded that the granting of the authority sought by plaintiff would not be consistent with

the public interest and the national transportation policy, exceptions thereto were filed on behalf of the plaintiff. On September 25, 1963 the Commission, Division 1, entered its order which affirmed and adopted the findings and conclusions of the examiner and denied the plaintiff's application. The proceeding before the Commission and its order were administratively final; no further action was required of plaintiff. Malone Freight Lines, Inc. v. United States, 204 F.Supp. 745 (N.D.Ala.1960); State of Arizona v. United States, 220 F.Supp. 337 (D.Ariz. 1963)."

Transamerican Freight Lines, Inc. v. United States; 258 F.Supp. 910 (1966) contains a detailed review of §17 of the Interstate Commerce Act and of the legislative history leading to its enactment in 1958. In its opinion the statutory three judge Court for the United States District Court of Delaware concluded that "under the Interstate Commerce Act the Commission has no power to review an appellate division decision, even if the proceeding does involve an issue of general transportation importance." (258 F.Supp. 913).

Specifically construing §17(9) of the Act, the Court stated:

"Subparagraph (9) not only requires the exhaustion of all administrative remedies, but it specifies the point at which all administrative remedies have been exhausted. When the decision complained of is rendered by a "division, individual commissioner, or board," *the administrative remedy is exhausted when an application for reconsideration had been denied or otherwise disposed of by the 'Commission or an appellate division,'* depending upon whether the Commission has retained the application or has referred it to an appellate division. *The denial*

of the application by either terminates all of a litigant's rights before the Commission. Thereafter his only remedy lies in the courts." 258 F.Supp. 910 (Emphasis supplied).

The Court in the *Transamerican* case even concluded that §101(a) (4) of the Commission's General Rules of Practice, affording parties an opportunity to file a petition seeking the Commission to declare a case to have general transportation importance, is violative of §17(9) of the Act. While this Court might disagree with that conclusion, the *Transamerican Freight Lines* holding that administratively final orders are reviewable is unassailable.

This brings us to a consideration of *Resort Bus Lines, Inc. v. I.C.C.*, 264 F.Supp. 742 (1967). This case was decided by a special three-judge court in the United States District Court for the Southern District of New York, with the opinion written by the present Senior Circuit Judge of this Court.

In the Commission proceedings which were reviewed by the Court in the *Resort* case, an applicant seeking interstate bus authority received a favorable hearing examiner's recommended report which was subsequently reversed by Review Board No. 3. The applicant filed a petition for "review" of the Board's decision (see 264 F.Supp. 744, Footnote 3) which was "summarily affirmed in April, 1965 by Division 1 of the Commission acting as an Appellate Division" (ibid). Subsequently, the Division entertained a petition for reconsideration of the April, 1965 order and concluded the authority sought by the applicant was required by the public convenience and necessity. Resort's petition for reconsideration of that order was denied in August, 1966 and it subsequently sought judicial review to have the Commission's final order enjoined and set aside.

Referring to sections 17(6)* and 16(6) of the Interstate Commerce Act, the Court stated at 264 F.Supp. 745:

"These provisions have been interpreted as giving the Commission continuing jurisdiction to suspend, reconsider or modify its orders, see e. g., Alamo Express, Inc. v. United States, 239 F.Supp. 694 (W.D.Tex.), aff'd per curiam, 382 U.S. 19, 86 S.Ct. 83, 15 L.Ed.2d 14 (1965); United States v. Interstate Commerce Commission, 221 F.Supp. 584 (D.D.C. 1963), even in the absence of a petition for reconsideration, see Sprague v. Woll, 122 F.2d 128 (7th Cir. 1941), cert. denied, 314 U.S. 669, 62 S.Ct. 131, 86 L.Ed. 535 (1942). And the Supreme Court has stated that "the certificate is the final act or order that validates the operation. Until its form and content are fixed by delivery to the applicant, the power to frame it in accordance with statutory directions persists." United States v. Rock Island Motor Transit Co., 340 U.S. 419, 448, 71 S.Ct. 382, 398, 95 L.Ed. 391 (1951).

"[4] We can see no reason why, if the Commission possesses this continuing jurisdiction, an Appellate Division doing the work of the Commission at least should not have the same power. The Appellate Division is merely sitting in lieu of the full Commission for reasons of administrative efficiency, in the manner that a panel of a Court of Appeals, instead of the entire contingent of judges of the Court, is authorized to decide appeals. Moreover, it is in the best interests of judicial economy and agency responsibility to allow the Appellate Division to

* The Court's Footnote No. 5 at 264 F.Supp. 745 refers to the legislative history of Section 17 set forth in the *Transamerican Freight Lines* case, and its holdings concerning Rule 101(a)(4) of the Commission's General Rules of Practice and notes that "the Commission has declined to follow that ruling."

reconsider its orders, rather than to compel the losing party to seek immediate review in the courts.[6*] Thus, both logic and sound policy require that the Appellate Division be empowered to reconsider its own actions. We therefore reject Resort's jurisdictional argument.[7*]"

"[6*] *The fact that the losing party may ask the Appellate Division to reconsider its order does not mean, as Resort seems to suggest, that the order is not administratively final. The aggrieved party may, if it wishes, seek review in the courts rather than look for reconsideration in the Appellate Division.* An analogous situation occurs when a panel of a Court of Appeals renders its decision. The losing party may ask the panel to rehear the case, but the decision is nevertheless 'final' in the sense that Supreme Court review may be sought without a prior request for rehearing." (Emphasis supplied.)

[7*] Footnote omitted.

While the Commission may have inherent continuing jurisdiction to reconsider orders in a motor carrier public convenience and necessity case, either before or after issuance of the certificate,* we respectfully submit that the Commission neither has nor needs such inherent continuing jurisdiction to reconsider administratively final orders with respect to rate cases such as involved in this review proceeding.

The Commission requires no *inherent* jurisdiction to review administratively final orders in rate cases because under section 15(1) of the Interstate Commerce Act [49 U.S.C. §15(1)], it has *express* jurisdiction to review the lawfulness of *any* existing freight rates, either on its own initiative or upon complaint being filed with the Commission by "any person, firm, corporation, company, or association, or any mercantile, agricultural or manufacturing society or other organization, or

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* Few would quarrel with the proposition that the Commission had the power not to issue a PCN certificate after rendering a final decision in a motor carrier case if subsequently the applicant became bankrupt, ceased operating existing authority or for any of a myriad of reasons the Commission had reason to believe it was unfit, financially or otherwise, to receive the certificate.

any body politic or municipal organization, or any carrier" (see also section 13(1) of the Act [49 U.S.C. §13(1)].

In any event, whether or not the Commission has inherent powers to review final orders, the existence of such a power has no bearing upon the question of whether or not particular orders are administratively final (see Resort case footnote 6, p. 36, *supra*) and certainly the existence of such inherent power would not vest a court with jurisdiction to review an administratively final order pursuant to a review petition filed more than sixty days after its entry.

CONCLUSION

If the Motion to Dismiss New York's Petition for Review of the Commission's August 5, 1975 Order is denied, or if the Court agrees to review the lawfulness of the Commission's Order finding the three rates to be lawful as a result of New York's Petition to Review the February 11, 1976 Order, it will mean that in the future federal administrative agencies, including the Interstate Commerce Commission, could delay judicial review by parties adversely affected by a "final" agency order, by the simple expedient of finally deciding all but one of the issues involved in a particular case. Subsequently, that agency could postpone issuance of its last order, if it so chose, until compelled to act by a federal court mandamus order. The Fidelity case, *supra*, contains a remarkable example of extreme dilatory action and downright intransigence by a Federal agency, in this case the FCC. At 502 F. 2d 452 the District of Columbia Circuit Court castigated the Commission's behavior as follows:

> "The tardigrade pace taken by the Commission with respect to Fidelity's repeated efforts just to obtain a ruling has now consumed nine years."

> "We cannot condone the Commission's attempted eradication of Fidelity's rights to judicial review simply by its coinage of the phrase 'deem to deny' in apparent defiance of this Court's determination that a final decision should issue."

Assuming that the State of New York, or the interests it represents in these proceedings, were adversely affected by the Commission's August 5, 1975 order, which was clearly administratively final with respect to three of the four unit train rates involved in the Commission proceedings, neither legislative enactment, judicial precedents nor common sense would justify delaying New York's right to seek judicial review until the Commission issued its last order in the *Martins Creek* case. In this case the delay would have exceeded six months. In other Interstate Commerce Commission proceedings it might well extend into many years. During all of that time parties adversely affected by a final order "imposing an obligation, denying a right or fixing some legal relationship as the consummation of the administrative process", would have neither administrative nor judicial recourse.

Both New York and S&E Shipping rely upon the fact that the Commission, in its February 11, 1976 order, purports to reaffirm its finding that the first three rates were lawful. The fact remains, this question had been finally decided in the August 5, 1975 order. The only substantive question the Commission considered in the 1976 order was the lawfulness of the summer rates from the Twin Cities. Nothing the Commission may have said in that order could reinstate New York's right to petition this Court to review matters decided with administrative finality by the August 5, 1975 order.

The Court should grant Intervenors' motion to dismiss New York's petition to review the Commission's July 18, 1974 and August 5, 1975 orders and should confine its review to the lawfulness of the summer unit train rate from the Twin Cities to Martins Creek, Pennsylvania.

V. SUMMARY OF ARGUMENT ON THE MERITS

The scope of judicial review of the Commission's rate orders is particularly limited. The Supreme Court, in a long and unbroken line of decisions, has consistently held that orders of the Commission should not be set aside, modified or disturbed by a Court on review if they lie within the scope of the Commission's statutory authority, and are based upon adequate findings which are supported by the record, even though the court might reach a different conclusion on the facts presented.

Clearly New York and S&E Shipping have failed to assert any basis for setting aside the Commission's ultimate holdings that the unit train rates from the Twin Cities and Twin Ports to Martins Creek, Pennsylvania are lawful.

New York and S&E Shipping are foreclosed under the *Tucker* doctrine, 344 U.S. 33, (1952), from contending that *any* of the rates found lawful by the Commission violate Section 3(4) of Title 49 because that issue was not raised by any party seeking reconsideration by Division 2 acting in an Appellate capacity of the Division 2 July 18, 1974 order. New York is also foreclosed from contending that Great Lakes carriers were disadvantaged by the proposed rates on the same ground.

There is no merit to New York's contention that any of the involved rates violate Section 3(4) of the Interstate Commerce

Act. With respect to the rates from the Twin Cities to Martins Creek, the origin area is located 160 miles from the Twin Ports and the destination is located approximately 340 miles southeast of Buffalo, New York. Buffalo is not an intermediate point on the routes over which the rates apply from either the Twin Cities or Twin Ports to Martins Creek.

New York's contention that Great Lakes water carriers were disadvantaged by the proposed rates, raised for the first time in this review proceeding, is also without merit.

VI. ARGUMENT

A. The Scope Of Judicial Review Is Narrow And Well Defined.

There is a presumption that the Commission has properly performed its official duties, and this presumption supports its acts in the absence of clear evidence to the contrary. *Interstate Commerce Commission v. Jersey City*, 332 U.S. 503, 512 (1944) *Baltimore & Ohio R.R. v. United States*, 298 U.S. 349, 358-359 (1936).

A long line of Supreme Court decisions holds that orders of the Commission should not be set aside, modified, or disturbed by a court on review, even though the court might reach a different conclusion on the facts presented, if they lie within the scope of the Commission's statutory authority, and are based upon adequate findings supported by the evidence. See, *e.g.*, *United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 534-536 (1946); *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 139 (1939); *Mississippi Valley Barge Line Co. v. United States*, 292 U.S. 282, 286-287 (1934); *Virginia Railway Co. v. United States*, 272 U.S. 658, 663-666 (1926). See also *Consolidated Carriers Corp. v. United States*, 321 F.Supp. 1098, 1100 (S.D.N.Y. 1970) aff'd 402 U.S. 901 (1971).

The principle that has been consistently espoused in the foregoing cases was succinctly stated in *Resort Bus Lines, Inc. v. Interstate Commerce Commission*, 264 F.Supp. 743, 746 (S.D.N.Y. 1967), in which the court said:

> "Our role in reviewing agency findings is an exceedingly limited one:
>
> "The Commission's function is to draw such reasonable conclusions from its findings as in its discretion are appropriate. As we said in Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 620, 86 S.Ct. 1018, 1026, 16 L.Ed. 2d 131 (1966), 'the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.' It is not for the court to strike down conclusions that are reasonably drawn from the evidence and findings in the case. Its duty is to determine whether the evidence supporting the Commission's findings is substantial. . . .
>
> "Illinois Cent. R.R. Co. v. Norfolk & W. Ry., 285 U.S. 57, 69, 87 S.Ct. 255, 262, 17 L.Ed.2d 162 (1966)."

This limited scope of review is especially applicable to rate proceedings. As the Supreme Court pointed out in *Mississippi Valley Barge Line v. United States, supra*, 292 U.S. 286-287:

> "The structure of a rate schedule calls in peculiar measure for the use of that enlightened judgment which the Commission by training and experience is qualified to form. *Florida v. United States, ante* p. 1. It is not the province of a court to absorb this function to itself. *I.C.C. v. Louisville & Nashville R. Co.*, 227 U.S. 88, 100; *Western Paper Makers' Chemical Co. v. United States*, 271 U.S. 268, 271; *Virginian Ry. Co. v. United States*, 272 U.S. 658,

663. The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."

In *Board of Trade v. United States*, 314 U.S. 534, 546 (1942), the Supreme Court stated:

"The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems. . . ."

Thus, whether given rates of carriers are reasonable or unduly prejudicial are factual determinations confided by Congress to the judgment and discretion of the Commission. *Interstate Commerce Commission v. Martin Bros. Box Co.*, 219 F.2d 811 (C.A. 10, 1955), *cert. den.* 350 U.S. 823, *motion den.* 350 U.S. 909.

The underlying rationale upon which the narrow scope of judicial review is predicated was explained in *Short Line, Inc. v. United States, et al.*, 290 F.Supp.. 939, 942 (D.R.I. 1968) as follows:

"Congress was very deliberate in adopting this standard of review. It frees the reviewing Courts of the time-consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of the statute. These policies are particularly important when a court is asked to review an agency's fashioning of discretionary relief. In this area agency determinations

> frequently rest upon a complex and hard-to-review mix of considerations. By giving the agency discretionary power to fashion remedies, Congress places a premium upon agency expertise, and, for the sake of uniformity, it is usually better to minimize the opportunity for reviewing courts to substitute their discretion for that of the agency."

It is in the context of the well-established standards embodied in the foregoing cases that the contentions of petitioner and its supporting intervenor must be evaluated.

B. The Contentions Of New York And S & E Shipping With Respect To Section 3(4) Of The Act Are Not Properly Before This Court Since They Were Not Raised Before The Commission On Reconsideration And, In Any Case, Are Without Merit.

Both New York and S & E Shipping argue vigorously that publication of the rates approved by the Commission in its decision of July 18, 1974, are violative of Section 3(4) of the Interstate Commerce Act [49 U.S.C. 3(4)]. Although, as will be discussed, *infra*, such contentions are totally without substantive merit, it is unnecessary for the Court to reach substantive consideration of them since, under well-established standards of judicial review, they can not properly be raised before the Court.

The findings with respect to Section 3(4) which New York and S & E attack were set forth in the Commission's decision of July 18, 1974. Petitions for reconsideration of that decision, insofar as it authorized publication of the rates here in issue, were filed by New York State, by the Lake Carriers' Association, and by the Chicago Board of Trade (Documents 179, 164

and 177 respectively, CIR). None of those documents make any mention of Section 3(4) or any argument which reasonably could be construed as an argument that the Commission committed error with respect to its Section 3(4) findings. Having failed to avail themselves of their right to raise the Section 3(4) issue in their petitions for reconsideration, New York and S & E Shipping cannot raise it here. As previously noted, S & E Shipping was not even a party to the Commission proceedings.

In *United States v. L. A. Tucker Truck Lines*, 344 U.S. 33, 36-37, 97 L.Ed. 54, 58 (1952) the Court stated:

> "We have recognized in more than a few decisions, and Congress has recognized in more than a few statutes, that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts.
>
> * * * * *
>
> "Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice."

More recently in *Slay Transportation Co., Inc. v. United States*, 353 F.Supp. 555, 558 (E.D. Mo. 1973) a three-judge District Court relying on *Tucker* made clear that "the time appropriate under its practice" for asserting contentions of administrative error is the time at which a petition for reconsideration is filed. Specifically the Court stated that:

> "Any contentions not raised in the petition for reconsideration are deemed waived and may not be thereafter asserted in the Court action."

See also in this regard *Transit Homes, Inc. v. United States*, 299 F.Supp. 950, 956 (D.S.C. 1069) and cases cited therein holding that Section 17(9) of the Interstate Commerce Act [49 U.S.C. 17(9)] also acts as a bar to judicial review of issues not raised before the agency in an appropriate petition for reconsideration.

Even if the Section 3(4) assertions of New York and S&E Shipping were properly before this Court for review they would provide no basis for setting aside the Commission's decision. To begin with, although they both argue that the proposed rate is part of a plan by the railroads to discriminate against them, reference to the record shows that such an argument is totally fallacious. Essentially, New York and S&E Shipping contend that the rail respondents have published a summer level unit train rate from the Twin Ports to Martins Creek but have refused to publish a comparable unit train rate available for ex-lake traffic from Buffalo to Martins Creek. The fatal defect in that argument is the total absence of any evidence suggesting that any lake carrier or anyone else has ever asked to have an ex-lake unit train rate published from Buffalo to Martins Creek.* In effect, they are attacking the railroads for not having done something they have never been asked to do. Furthermore, even if such a request had been made, under the facts of record which were before the Commission in this proceeding, it would have had no basis for find-

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* Their argument addresses itself exclusively to the Twin Ports summer rate. It has no bearing on the Twin Ports winter rate or the dual rates from the Twin Cities, located some 160 miles from Duluth.

ing that the lake carriers would be prejudiced by a refusal of Eric Lackawanna to publish such a rate.

The only potential user of trainload quantities of grain at Martins Creek, Pa., which is the only destination involved in this proceeding, is ConAgra. ConAgra's witness testified unequivocally that it would not use such a rate even if published (See Appendix, Tr. 536-538). He indicated that his desire to avoid Buffalo stemmed from operational considerations such as lack of adequate facilities to load unit trains in a timely fashion and congestion which produces costly delays and poses a serious threat of interruption in ConAgra's production operations at Martins Creek due to lack of raw material (See Appendix, Exhibit 16, pp. 20-21).

Contrary to the suggestions of New York and S&E Shipping the record simply does not support the picture that they attempt to paint of the lake carriers being threatened with a serious loss of traffic because of predatory tactics. Rather, what the record reveals is that Buffalo has a virtual stranglehold on grain traffic moving from Twin Ports/Twin Cities to Northeastern mills and that the proposed rate is nothing more than a completely lawful attempt by rail respondents to provide ConAgra with a competitive option which allows it to avoid the Buffalo bottleneck. (See discussion at pages 8-13, *supra.*)

Turning to the specific grounds upon which the Commission's findings with respect to Section 3(4) are attacked, it is perhaps worthwhile to first pause and look briefly at precisely what Section 3(4) says. The first clause of the section, which deals with the requirement of making available equal facilities for interchange of traffic to all connecting carriers, is not in issue in this proceeding. The balance of the section provides that:

> "All carriers subject to this part . . . shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III."

It is the foregoing language of the section that petitioner and supporting intervenor believe to be violated by the rates which were approved in the proceeding below. The Commission's findings on this point were set forth in its order of July 18, 1974, at 346 I.C.C. 852 as follows:

> "Section 3(4) provides in effect that rail carriers shall not discriminate in their rates between any connecting line or unduly prejudice any connecting line in the distribution of traffic that is not routed by the shipper. Insofar as is pertinent to the issues in this proceeding, a connecting line is defined as a common carrier by water subject to part III of the act. So far as the record shows, protestant's members are not regulated carriers and, therefore, not entitled to protection under section 3(4). Aside from this, however, it is clear that there is no merit in protestant's argument. Section 3(4) is designed to discourage unequal treatment of connecting carriers at a given point. The proposed all-rail route passes well south of Buffalo and Erie does not extend unequal treatment at Buffalo as between carriers."

Since the traffic involved herein is in every case routed by ConAgra it is, in any case, beyond the purview of Section

3(4). However, as the foregoing language indicates, the Commission chose two other equally obvious grounds to find that Section 3(4) has no application to the facts of this case.

First, the Commission noted that the record that was before it was devoid of any evidence that any of the protesting lake carriers is in fact a "common carrier by water subject to part III." The propriety of this finding is confirmed by the fact that New York in attempting to refute it at pages 12 and 13 of its brief was compelled to go beyond the record that was before the Commission in this case to find support for its argument that certain of the lake carriers are common carriers subject to part III. First, it cites documents No. 6 and No. 7, CIR which are protests and petitions for suspension filed by the Great Lakes Ship Owners Association* and the Lake Carriers Association in the suspension proceedings (i.e., Suspension Case No. 59923) which preceded the separate and distinct investigatory proceeding which is before this Court for review (i.e., Docket No. I & S 8899). Those documents were presumably included in the Commission's Index merely as a courtesy to the Court since, under the Commission's Rules of Practice, they are clearly not part of the record in this proceeding. Rule 19 of the Commission's Rules of Practice (49 U.S.C. 1100.19) provides:

> "Recitals of material and relevant facts in a pleading filed prior to oral hearing in any proceeding unless specifically denied in a counterpleading filed under these rules, shall constitute evidence and be a part of the record without special admission or incorporation therein, but if request is seasonably made, a competent witness must be made available for cross-examination on the evidence so

* The Great Lakes Ship Owners Association took no part in the proceedings which is under review by the Court.

included in the record. Pleadings may contain specific references to or quotation from the tariffs or schedules containing the several rates, fares, charges, schedules, classifications, regulations or practices alleged to be material. *A filing under Rule 42 Petitions for suspension of tariffs or schedules, shall not be considered a pleading for purposes of this rule.*" (Emphasis supplied.)

Documents No. 6 and No. 7 are petitions for suspension of tariffs and, therefore, by virtue of the exclusionary provision of Rule 19, the material contained therein was not part of the record before the Commission in Docket No. I & S 8899. Presumably, if the members of the Lake Carriers Association had any basis for asserting that they were carriers actually engaged in any operations subject to part III of the Act they would have done so. Although the Lake Carriers Association did present a witness in the proceeding which is here under review (See Appendix, Exhibit No. 29) he gave absolutely no indication that any of the members of his Association were carriers subject to part III of the Act. Nor did he even identify who the members of his Association are, so there was no way for the Commission to determine from its records, as petitioner suggests that it should have, whether any members of the Association are actually engaged in common carriage subject to part III of the Act.*

Under such circumstances it can hardly be found that the Commission committed error in determining on the record presented to it that it had no basis for finding that any of the unidentified members of the Lake Carriers Association are car-

* It is also highly significant that S & E Shipping Corp. vigorously asserts in its brief to this Court that it and the other carriers engaged in the grain trade on the Great Lakes are not subject to Part III of the Act.

riers subject to part III of the Act. Indeed, if the Commission had made such a finding on the basis of the evidence that was presented to it, these intervenors submit that such a finding would have been so lacking in evidentiary support as to warrant its being set aside on judicial review.

New York also takes issue with the Commission's finding that, because the all-rail route from Twin Cities/Twin Ports to Martins Creek passes well south of Buffalo, there can be no unequal treatment of connecting carriers at Buffalo. In doing so, petitioner misinterprets the Commission's finding on this point.

Beginning at page 15 of its brief New York suggests that the Commission has taken the position that before a section 3(4) violation can be found to exist there must be a common point of interchange (i.e. a single point along the route in question where the rail carrier allegedly violating section 3(4) connects with both a favored rail carrier and a disfavored water carrier). By making that argument petitioner has, in effect, set up a straw-man, since the Commission has not stated that a common point of interchange is an essential prerequisite to the applicability of section 3(4).

What it has stated is that somewhere along the all-rail route there must be a point of interchange with a water carrier. It need not exist at the same point at which a rail interline connection exists but it must nevertheless exist. Here, as the evidence demonstrates and the Commission properly found, the assailed all-rail routing does not even come near Buffalo, the point at which petitioner argues that water "connections" are discriminated against. Petitioner does not dispute this undisputable fact but instead argues that because EL happens to serve Buffalo, albeit via trackage which is wholly unrelated to the all-rail routing involved in this proceeding, that fact

alone is sufficient to bring section 3(4) into play. That is not what section 3(4) says and it is not what the cases relied upon by petitioner say.

Petitioner relies particularly upon a recent decision of the Commission in *Ingot Molds, Ohio & Pa. to Cypress, Tex.*, 349 I.C.C. 102 (1975). Specifically, at page 16 of its brief, petitioner grounds its argument on this point on the following carefully edited quote from *Ingot Molds*:

> "With regard to the competing all-rail and barge-rail routes, the last leg of both is via the SP—with the barges interchanging at Houston, Tex., and the railroads interchanging at . . . Corsicana, Tex., as depicted below: 349 I.C.C. at 107"

The above quoted language, from which the words "Shreveport, La., or" have been omitted, is followed by a sketch map of two routings from Neville Island, Pa. to Cypress, Tex. One is via Shreveport, La. and traverses Houston, Tex. The second is via Corsicana, Tex. and does not traverse Houston. By omitting reference to the Shreveport routing petitioner apparently intended to create the impression that the basic issue involved in *Ingot Molds* was the lawfulness of the all rail route via Corsicana *vis a vis* the water-rail route via Houston. An objective reading of the Commission's decision, however, reveals that this was simply not the case. Rather the fundamental issue was the failure of the rail carrier therein involved ("SP") to provide connecting water carriers an ex-barge rate at Houston equivalent to the Houston to Cypress portion of its all-rail rate. All of the cost evidence and all of the discussion of the applicability of section 3(4) was directed to the rail-routing via Shreveport and Houston. The Corsicana routing was obviously just ancillary to the routing via Shreveport

and Houston over which the water carriers were denied rate parity. As the Commission observed in defining the essence of the controversy:

> "The thrust of protestant's argument, however, is not that the reduced all-rail rate is too low, but rather that the rail rate of $9.63 per gross ton applicable on the ex-barge movement is unreasonably high, and that this high rate coupled with the reduction of the all-rail rate or even when standing alone acts to preclude water carriers from participating in the involved traffic." (349 I.C.C. at 105)

The ex-barge movement referred to was, of course, via the Shreveport-Houston route.

The fact that the Commission's decision was focused primarily on the rate disparity in existence via the Shreveport-Houston route is also readily apparent from the following discussion at page 112 of the Commission's decision:

> "That protestant barge carriers are being subjected to discrimination contrary to section 3(4) of the act is also shown by the following hypothetical situation. Let us assume, arguendo, that instead of Shreveport, La., the point of interchange with the connecting rail carrier is at Houston, Tex., an intermediate point on the route from Shreveport to Cypress. Then the SP would be interchanging with the connecting rail carriers and the protestant barge lines at the same point (Houston) and yet would be charging $9.63 on the 25.5-mile ex-barge movement while accepting a division of $2.49 for performing the same service on the all-rail movement. Under these circumstances, it is clear that the substantially higher rate applicable on the ex-barge movement is unjust, unreasonable, and discriminatory. This hypothetical situation clearly illustrates the

disparity in charges and service provided by the SP under the rates in question. Yet, instead of transporting the involved commodities only 25.5 miles, from Houston to Cypress as in the hypothetical situation for its division of $2.49, in actuality the SP is hauling them 184 miles from Shreveport to Cypress for the same $2.49.

From the foregoing discussion we think it is clear that if a rail carrier, *at any point where interchange is available in effecting through transportation,* accords more favorable treatment to a rail carrier than to a water carrier with respect to the same service, it is guilty of discrimination under section 3(4) unless it can be shown that it is more costly to provide the service for the water carrier than for the rail carrier." (Emphasis supplied.)

If in the instant case the all rail routing passed through Buffalo, the situation would be at least physically analogous to the situation presented in *Ingot Molds* where an all-rail route passed through Houston. However, as the Commission stated and as no one contests: "The proposed all-rail route passes well south of Buffalo . . . ." Therefore, the situation here is fundamentally different from that presented in *Ingot Molds* and neither that case nor any of the others relied upon by petitioner provides any basis for finding that the Commission was in error in finding that section 3(4) is clearly inapplicable to the facts of this case.

C. None of the Proposed Unit Train Rates Violates Section 3(1) of the Interstate Commerce Act.

Section 3(1) If the Interstate Commerce Act [49 U.S.C. §3(1)] provides:

> "It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

In briefs and petitions for reconsideration filed in the Commission proceedings, various parties urged the Commission to find, for a variety of reasons, that the proposed rates violated Section 3(1).

The Buffalo Mills brief argued that "a blatant violation of Section 3(1) of the Interstate Commerce Act" existed because of alleged commitment made by the Soo Line to furnish ConAgra with cars and because "a more liberal free time privilege is accorded at Martins Creek than at Buffalo" (at page 90 of No. 138, CIR). The Commission's Initial Decision rejected these arguments at 346 I.C.C. 844 and no party sought reconsideration thereof.

Chicago's brief to the Commission (No. 134, CIR) and its petition for reconsideration (No. 177, CIR) alleged a §3(1) violation because the unit train rates, as originally published, did not contain an intermediate origin application which would have made the rates applicable from Chicago to Martins Creek. The Initial Decision rejects this contention at 346 I.C.C. 854 and Chicago's petition for reconsidered on this point was disposed of with administrative finality by the Commission's August 5, 1975 order.

The Buffalo Mills (at pages 61-64 of No. 138, CIR) and the joint brief of International Association of Great Lakes Ports and the Seaway Port Authority of Duluth (at pages 4-7 of No. 137, CIR) alleged that the summer rate from the Twin Cities to Martins Creek violated §1(5) of the Interstate Commerce Act and the latter brief also alleged in one short paragraph containing neither rationale nor any citation of authority, that the summer rate from the Twin Cities resulted in "undue preference of Minneapolis and undue prejudice to Duluth" in violation of §3(1) of the Act (page 8 of No. 137, CIR).

The Initial Decision stated at 346 I.C.C. 855:

> "We agree with protestants. Both Twin Cities and Twin Ports are large grain terminal centers and we may properly assume that they are in competition for the outbound movement of wheat. Twin Ports by reason of its location has a transportation advantage in relation to Twin Cities which the proposed 72.25-cent rate ignores. Respondent Soo serves both Twin Cities and Twin Ports and does not show why a water-related rate from Twin Ports should be applied to origins 160 miles inland. We are not persuaded that past practices equating the rates to and from the two markets nor the future possibility of fourth section violations in the event other carriers

> join the adjustment constitute sufficient reason for similarity of treatment in this proceeding. A lawful rate from the preferred origins would be 88 cents which is substantially the product of the local 15-cent rate from Twin Cities to Twin ports and the proposed 72.25-cent rate beyond."

The Initial Decision contained no further discussion of this subject.

After respondent railroads and ConAgra petitioned for reconsideration of the Initial Decision's holding that the summer rate from the Twin Cities to Martins Creek was unlawful, and various protestants' replies thereto were filed, Division 2 ultimately issued its February 11, 1976 order which cogently and convincingly rejects the Initial Decision's holding as to the summer rate from the Twin Cities. (See 351 I.C.C. 473-478).

At pages 2-6 of its petition for reconsideration (No. 171, CIR) New York, although not then claiming that it stood in *parens patria* to the Buffalo Mills, asserted that the summer rates violated section 3(1) of the Act *because of their adverse effect upon Buffalo shippers*. The Commission rejected this argument at 351 I.C.C. 477, noting:

> "In the prior report division 2 dealt with these arguments as applied to the navigation season rate from the Twin Ports. It found that the proposed open and closed season rates from Twin Ports are structured as nearly as practical to equalize the alternative transportation costs as between Buffalo and Martins Creek and that bakers in eastern territory exercise a considerable degree of mobility in the purchase of flour, many floating from one producer to another, which suggests that factors other than transportation costs also influence mobility

in the selection of flour distributors. At page 848 of the prior report division 2 stated:

"The marketing of flour is a competitive business with sales turning on as little as a cent or less difference per 100 pounds. The positioning of flour mills close to the markets they will serve is a policy of ConAgra, as well as the mills with which it competes. It is not the purpose of the act to equalize every producer's position in a given market. See Wheat & Wheat Flour, Westbound, 337 I.C.C. at 879-880."

In its brief submitted to this Court, New York abandons its prior section 3(1) argument and now alleges, for the first time, that a section 3(1) violation exists because the summer rates are unduly prejudical to unidentified water carriers operating on the Great Lakes, an allegation not found in any petitions for reconsideration of the Commission's Initial Decision.*

To support its newly discovered section 3(1) argument, New York relies principally upon *Lake Carriers' Association v. United States*, 399 F.Supp. 386 (1975) N.D. Ohio. In that case the involved railroads published unit train rates which were substantially lower than the rail-lake rates which had moved the traffic and refused to publish comparable rail-lake rates demanded by complainant water carriers. The Martins Creek unit train rates, as heretofore noted, merely equalized the transportation costs incurred by ConAgra in moving wheat from the Twin Ports to Martins Creek via water-rail and slightly *exceeded* the lake-truck costs.

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* Having failed to avail itself of the right to raise this issue in its petition for reconsideration, New York cannot raise it here. (See pp. 40-43, *supra*.

In the *Lake Carriers'* case the court noted, at 399 F.Supp. 393 that:

> "[i]f the all-rail routes are truly the lower cost system, then the railroads have nothing to fear from the publication of a tariff or unit-train service prescribing proper rates to the ports. The Interstate Commerce Act does not shield water carriers against any form of competition, but it does require that the competition be fair and that any discrimination be just."

Neither the interests represented by New York nor any other protestant in the Commission proceedings introduced any cost evidence whatsoever. In the face of this deficiency, there is no way the Commission could have adopted a finding concerning the relative cost of moving wheat in unit trains or via a lake-rail route.

Furthermore, New York has failed to allege that any party to the Commission proceedings ever requested the Erie Lackawanna to publish unit train rates on wheat from Buffalo to Martins Creek. New York could not make such an allegation since the Commission's record on the subject is completely silent.

Under these circumstances, the Commission could not conclude the proposed summer rates were unduly prejudicial to lake carrier interests.

Finally, it should be noted that New York's brief to this Court, submitted in support of its petition for review of the Commission's February 11, 1976 order, contains no discussion or argument relating to the lawfulness of the summer rate from the Twin Cities to Martins Creek. Consequently, *New York's brief fails to address itself to the lawfulness of the only rate it is entitled to have reviewed by the Court.*

CONCLUSION

For all the reasons stated, the petition for review should be denied.

Respectfully submitted,

BY LOUIS A. H. PEPPER
36 West 44 Street
New York, New York 10036
(212) 575-0925
C. HAROLD PETERSON
Soo Line Railroad Company
Soo Line Building
Minneapolis, Minnesota 55440
(612) 332-1261
PETER A. GREENE
1625 K Street, N.W.
Washington, D.C. 20006
(202) 393-3390
Attorneys for Soo Line Railroad Company and ConAgra, Incorporated

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